

WHEN EVERYONE IS THE JUDGE'S PAL: FACEBOOK FRIENDSHIP AND THE APPEARANCE OF IMPROPRIETY STANDARD

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INTRODUCTION

In April of 2010, Facebook announced that it had 500 Million users.² Ten years prior, the Internet itself had a smaller subscribership.³ It is apparent now more than ever that Facebook, like the Internet, is here to stay. It is not a fad or niche, but rather something that is becoming increasingly ubiquitous in all spheres of society, including one of our most revered institutions: the judiciary.

Unlike the typical Facebook user, legal professionals are bound by ethical codes.⁴ Doctrines of legal and judicial ethics not only guide actions relating to the representation of clients and the adjudication of disputes, but also govern conduct outside the courtroom.⁵ These ethical rules exist to both police the profession and uphold the integrity of our judicial system.⁶ Straying from these rules can lead to disciplinary

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² Jenna Wortam, *Facebook Tops 500 Million Users*, N.Y. TIMES, July 22, 2010, at B8.

³ *Internet Growth Statistics*, INTERNET WORLD STATISTICS, <http://www.internetworldstats.com/emarketing.htm> (last visited Sept. 10, 2011) (noting that in December 2000 the Internet had only 361 million users.).

⁴ See, e.g., N.Y. LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY, Preamble (Dec. 2007) ("[An] ... obligation of lawyers is to maintain the highest standards of ethical conduct.").

⁵ See, e.g., MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 2 (2007) ("This principle applies to both the professional and personal conduct of a judge.").

⁶ See, MODEL CODE OF JUDICIAL CONDUCT, Preamble (2007).

action against the legal professional and, at times, more severe legal repercussions.⁷

Members of the judiciary, as arbiters of fairness in our society, are held to a higher standard of ethical conduct than even attorneys. Beyond avoiding unethical behavior, judges and justices are required to avoid the mere “appearance of impropriety.”⁸ However, the actual facts underlying a member of the judiciary’s behavior are not dispositive. Behavior that causes a reasonable observer to subjectively perceive impropriety where none actually exists can still be grounds for sanction.⁹ This standard reflects our society’s imperative to not just ensure the integrity of individual judges, but to also preserve the image of the judiciary.¹⁰

Facebook-use in the legal profession presents a plethora of ethical issues. Many of these issues can be folded into existing interpretations of ethical rules.¹¹ This paper, however, focuses on one that cannot: the Facebook friendship and the “appearance of impropriety” standard imposed on members of the judiciary. We know that a judge presiding over a case where his friends are involved would certainly give rise to questions about appropriateness, and accordingly such an arrangement is often proscribed.¹² But would the same ever hold true when a judge presides over a Facebook friend? This paper attempts to determine whether there is a distinction, legal or otherwise, between an acquaintance and an acquaintance who is also a Facebook friend, and, specifically, if the latter is capable of creating the appearance of impropriety when the former is not.

The judicial duty to avoid the appearance of impropriety has a convoluted past and an uncertain future. What is already a murky doctrine becomes even more perplexing once one attempts to apply it to behavior on Facebook. Neither the states nor the American Bar Asso-

⁷ See, e.g. MODEL CODE OF JUDICIAL CONDUCT, Scope (Aug. 2010) (“[A] judge may be disciplined ... for violating a Rule”); *State v. Blackhoop*, 158 Ariz. 472, 476 (Ariz. Ct. App. 1988) (overturning a conviction because of the trial judge’s appearance of impropriety and racial bias).

⁸ See, MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007).

⁹ E.g., *In re Blackman*, 124 N.J. 547 (N.J. 1991).

¹⁰ *Id.* at 551 (holding that “such conduct may raise questions concerning the judge’s allegiance to the judicial system. Those impressions could generate legitimate concern about the judge’s attitude toward judicial responsibilities, weakening confidence in the judge and the judiciary.”).

¹¹ For example, an *ex parte* communication via Facebook is still just an *ex parte* communication. Hardly any additional analytical work is required.

¹² See, e.g., *In re Turney*, 311 Md. 246, 250 (Md. 1987) (holding that a judge could not preside over a close friend of his former wife’s stepson); *Moran v. Clarke*, 296 F.3d 638, 649 (8th Cir. Mo. 2002) (“The image of one sitting judgment over a friend’s affairs would likely cause the average person in the street to pause.”).

ciation have provided a clear answer as to what kind of behavior gives rise to the appearance of impropriety. In this vacuum, we are forced to reconcile the “appearance of impropriety” standard with Facebook-use and the growing prominence of social networking.

This paper explores the concept of the appearance of impropriety and its implications on Facebook-use in the judiciary. Part I gives an overview of Facebook’s growing presence in our society and covers the salient features of the network. Part II describes the presence of Facebook in the legal profession, and the problems it has caused and continues to cause. Part III details the history of the appearance of impropriety standard and, more specifically, how courts have applied it to various kinds of friendships in the past. Part IV describes what courts and ethical committees have already said about Facebook friendships and the appearance of impropriety standard, and what they will likely say, and should say, about Facebook friendships in the near future. Finally, Part V offers suggestions for the American Bar Association’s future course of action.

I. IT’S A FACEBOOK WORLD

Facebook is a website that provides a means of social interaction for its users. Users create a profile page, where they detail personal information including their interests, relationship status, hometown, affiliated employers and schools, all for the world to see.¹³ Perhaps Facebook’s most salient and oft-discussed feature is the ability to “friend”¹⁴ other users. Once two people become “Facebook friends,” they generally gain increased access to each other’s profile page, although the extent of that access is subject to each user’s privacy settings. Generally, users will be able to see a friend’s photographs, profile information, Facebook “groups” she has joined, and, perhaps most importantly, the notorious “Wall.”¹⁵ The Facebook Wall displays a variety of content, including the user’s “status updates,” other users’ comments, and a virtual trail of the user’s recent activity on the site.¹⁶ And this is just on the standard Facebook Wall. If a user has experimented with any of the innumerable Facebook applications, his or her

¹³ *Help Center: Profile*, FACEBOOK, <http://www.facebook.com/help/?page=402> (last visited Mar. 20, 2011).

¹⁴ *Help Center: Friends*, FACEBOOK, <http://www.facebook.com/help/?page=441> (last visited Mar. 20, 2011).

¹⁵ *Help Center: Friends: Friend Lists and Privacy*, FACEBOOK, <http://www.facebook.com/help/?page=768> (last visited Mar. 20, 2011).

¹⁶ *Help Center: Wall*, FACEBOOK, <http://www.facebook.com/help/?page=443> (last visited Mar. 20, 2011).

friends may be privy to even more intimate information, including, as one application offers, the user's current physical location.¹⁷

The modes of communication available to Facebook users are numerous, for example, users can post comments on their friends' Walls, the Walls of event pages, and the Walls of groups they belong to. Furthermore, users can comment on other users' comments,¹⁸ or just opt to leave their mark by "liking" the post with a simple click.¹⁹ Users seeking more discrete conversations can send email-like messages to other users' private inboxes²⁰, or engage in an instantaneous Facebook "chat" with online friends who choose to enable the feature.²¹ Finally, those who are particularly shy can "poke" other users and communicate without having to say a word.²²

Looking at all of these features, one cannot help asking a question that Facebook-creator Mark Zuckerberg loosely described asking himself during the site's nascency: who in their right mind would "want to put any [personal] information on the Internet at all,"²³ let alone to the extent Facebook permits? Answer: everyone, apparently. In July of 2010, Facebook announced that it had half a billion members.²⁴ Additionally, Facebook users posted 30 billion photographs and spend 700 billion minutes *per month* spent browsing the site.²⁵ Facebook hits account for one out of every four webpage views in America.²⁶ Clearly, what started as a website for college kids now

¹⁷ Denoja Kankesan, *How to Check Out of Facebook's New Personal Locator*, CBC NEWS, (Aug. 24, 2010), <http://www.cbc.ca/news/technology/story/2010/08/24/f-facebook-places-privacy.html>.

¹⁸ *Help Center: Commenting on Content*, FACEBOOK, <http://www.facebook.com/help/?page=201087386601310> (last visited Sept. 10, 2011).

¹⁹ *Help Center: Like*, FACEBOOK, <http://www.facebook.com/help/?page=773> (last visited Sept. 10, 2011).

²⁰ *Help Center: Sending a Message*, FACEBOOK, <http://www.facebook.com/help?page=938> (last visited Sept. 10, 2011).

²¹ *Help Center: Chat Basics*, FACEBOOK, <http://www.facebook.com/help?page=824> (last visited Sept. 10, 2011).

²² *Help Center: Pokes*, FACEBOOK, <http://www.facebook.com/help/?page=211647895534977> (last visited Sept. 10, 2011).

²³ Marshall Kirkpatrick, *Facebook's Zuckerberg Says the Age of Privacy is Over*, READ WRITE WEB, http://www.readwriteweb.com/archives/facebooks_zuckerberg_says_the_age_of_privacy_is_ov.php (Jan. 9, 2010).

²⁴ See Wortam, *supra* note 2, at B8.

²⁵ *Id.*

²⁶ Lev Grossman, *Person of the Year: Mark Zuckerberg*, TIME, Dec. 27, 2010, at 46-47.

appeals to a far wider demographic.²⁷ Men and women over 55 now make up two of the fastest growing user-groups.²⁸ With an estimated 50 million people joining Facebook each month, it is difficult to imagine any contingent resisting the trend.²⁹

Social media is rapidly replacing other modes of casual communication. In 2009, the U.S. Postal Service reported that the volume of first-class mail in December—excluding catalogs, packages, and junk mail—had fallen eighteen percent from its 2002 peak.³⁰ One writer suggests that Facebook is the explanation.³¹ Christmas cards, long used to update old friends on one's life, lose their utility when those people are Facebook friends.³² Facebook is quickly becoming the way we keep in touch.

Another less fortunate reality of the Facebook era is that common sense has frequently lagged behind the pace of social-networking innovation. For instance, many users have unwittingly blurred the line between what ought to be public and what should stay private. One writer observed that Facebook is beginning to “replace restaurants as the go-to place for couples to cause a scene.”³³ Many shameless individuals now use Facebook as a soapbox to berate their partners.³⁴ Couples often exchange jabs via Facebook comments for all of their friends to see, as the website “Lamebook” humorously catalogue.³⁵

Facebook also gives the public a new way to scrutinize public figures. Politicians, for instance, have become painfully aware of the downsides of maintaining an Internet persona. Numerous candidates have been forced to deal with unbecoming photographs coming to the public's attention through either their own Facebook use or postings by other users.³⁶ One candidate even found himself apologizing for his

²⁷ *Timeline*, FACEBOOK, <http://www.facebook.com/press/info.php?timeline> (last visited Sept. 10, 2011).

²⁸ Anita Gates, *For Baby Boomers, the Joys of Facebook*, N.Y. TIMES, Mar. 22, 2009, at NJ7.

²⁹ See Wortam, *supra* note 2, at B8.

³⁰ Damon Darlin, *Keeping our Distance, the Facebook Way*, N.Y. TIMES, Oct. 10, 2010, at BU5.

³¹ *Id.*

³² *Id.* (“There was a day ... when ... Christmas cards were the only way to reach out and say I care ... but now you gain timely and useful information as it trickles out, and not in a once a year data dump.”).

³³ Douglas Quenqua, *I Need to Vent. Hello, Facebook.*, N.Y. TIMES, Mar. 18, 2010, at E1.

³⁴ See LAMEBOOK, <http://www.lamebook.com/> (last accessed Sept. 10, 2011).

³⁵ *Id.*

³⁶ Jeremy W. Peters & Brian Stelter, *The Facebook Skeletons Come Out*, N.Y. TIMES, Nov. 7, 2010, at ST10.

college-aged son's unremarkable underage drinking.³⁷ And politicians are not the only ones facing the repercussions of their Facebook footprints.³⁸ One victim of this kind of negative Facebook publicity lamented that we all thought this day would arrive, "but that it would be in 20 years, not in two years."³⁹

In 2006, *Time Magazine* recognized the profound impact of the Internet by bestowing its coveted "Person of the Year" award to the collective Internet user.⁴⁰ A mere four years later, and Facebook had apparently established its permanence: *Time* named Facebook creator Mark Zuckerberg its Person of the Year, poignantly noting that "Facebook has merged with the social fabric of American life."⁴¹ The Facebook age is here to stay; as for how the website fits into our social norms, rules, and laws, we still seem to be flying blind.

II. LEGAL PROFESSIONALS JOIN THE PARTY

As one would expect, some of those 500 million Facebook users are lawyers and judges. A 2009 study showed that three-quarters of the attorneys surveyed were members of a social network, such as MySpace, LinkedIn, or (of course) Facebook.⁴² Attorneys, like many professionals, have started to use Facebook not just in their own social lives, but in their professional lives as well.⁴³ For lawyers and judges, Facebook is not just a tool to find an ex-girlfriend or an old high school classmate; it is a way to network with other legal professionals.

³⁷ *Id.*

³⁸ Chris Matyszczyk, *Too Much Facebook Gets Nun Banished from Order*, CNET NEWS, (Feb. 19, 2011), http://news.cnet.com/8301-17852_3-20033933-71.html (reporting on a nun who was asked to leave her convent because of her increasing Facebook popularity); *Cf.* Randy Cohen, *When Med Students Post Patient Pictures*, N.Y. TIMES, Feb. 13, 2011, (Magazine), at MM21 (reporting on medical students who were publically chastised, albeit anonymously, for posting pictures of patients and inserting funny captions).

³⁹ Peters & Stelter, *supra* note 36, at ST10.

⁴⁰ Formally presented to "you," the award was meant for hundreds of millions of Internet users. *See* Lev Grossman, *Time's Person of the Year: You*, TIME, Dec. 25, 2006, at 40, available at <http://www.time.com/time/magazine/article/0,9171,1570810,00.html>.

⁴¹ Grossman, *supra* note 26, at 50.

⁴² *2009 Networks for Counsel Study: A Global Study of the Legal Industry's Adoption of Online Professional Networking, Preferences, Usage, and Future Predictions*, LEADER NETWORKS, 10 (2009), http://www.leadernetworks.com/documents/Networks_for_Counsel_2009.pdf.

⁴³ Numerous law firms, large and small, now have Facebook pages. *E.g.*, Squire, Sanders & Dempsey, *Organization Page*, FACEBOOK, <http://www.facebook.com/pages/Squire-Sanders-Dempsey/313797101818>.

For the most part, state bar associations have welcomed, and even ushered in, the new world of social networking. For example, the *Texas Bar Journal* has published several articles encouraging attorneys to take advantage of Facebook. One article, written by a media consultant, disparages firms that are guilty of “under-utilizing Facebook,” and holds up various firms with content-filled Facebook pages as examples for the less tech-savvy firms to aspire to.⁴⁴ The piece recommends posting videos of staff functions and starting discussions that may interest clients.⁴⁵ It concludes by encouraging law firms to “experiment and figure out” how to best use social media to their benefit.⁴⁶

Another article in the *Texas Bar Journal* offers Facebook “do’s and don’ts” for lawyers and judges, and is decidedly pro-Facebook.⁴⁷ The article encourages lawyers to use the site to market themselves, and to “exchange information and ideas with colleagues.”⁴⁸ The article further recommends that judges use Facebook for “professional development and political advantage,” opining that Facebook is a cheap way to stay informed and “enhanc[e] public understanding of the judiciary.”⁴⁹ The article even advocates using the website to monitor the behavior of lawyers and parties appearing before the judge.⁵⁰

The legal profession’s embrace of social networking sites has not, however, been without setbacks. In 2008, an Illinois public defender was fired for comments she made on her blog, where she disclosed a client’s jail identification number and berated him for not ratting out his drug-dealer brother.⁵¹ Similarly, a prosecutor in San Francisco was disqualified after using obscenities to describe his opposing counsel on his own blog.⁵² A blogging Florida attorney was also reprimanded.

⁴⁴ Jordan Furlong, *Facebook for Law Firms*, 73 TEX. B.J. 450, 451 (2010).

⁴⁵ *Id.* at 450.

⁴⁶ *Id.* at 451.

⁴⁷ Judge Gena Slaughter & John G. Browning, *Social Networking Dos and Don’ts for Lawyers and Judges*, 73 TEX. B.J. 192 (2010).

⁴⁸ *Id.* at 193.

⁴⁹ *Id.*

⁵⁰ *Id.* at 194.

⁵¹ Angela O’Brien, *Are Attorneys and Judges One Tweet, Blog or Friend Request Away From Facing a Disciplinary Committee?*, 11 LOY. J. PUB. INT. L. 511, 515 (2010). A blog is “A website that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer.” *Blog definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/blog> (last visited Sep. 14, 2011).

⁵² Slaughter & Browning, *supra* note 47, at 193.

manded for characterizing a judge as an “evil, unfair witch.”⁵³ While these blogs were available through independent websites, Facebook provides its users with the ability to blog through its “notes” feature, which is essentially the same concept.⁵⁴

Facebook usage has already created its own issues for the legal community. For example, in Texas, a judge denied an attorney’s request for a second continuance after seeing pictures of the lawyer partying on Facebook.⁵⁵ The judge originally granted the attorney an initial continuance so that the attorney could tend to the supposed death of his father.⁵⁶ But after the judge saw the lawyer partying in recent Facebook pictures, he was not so sympathetic when the attorney made a second continuance request.⁵⁷

In another instance, a North Carolina judge was publically reprimanded for *ex parte* communications through Facebook.⁵⁸ During a child custody case, the judge “friended”⁵⁹ the defendant’s attorney.⁶⁰ The judge and the attorney then began exchanging messages about the on-going case.⁶¹ Once this came to the attention of the plaintiff’s attorney, the judge was removed and a new trial was granted.⁶²

Facebook’s impact on legal and judicial ethics has already been considerably widespread, and there is no indication that Facebook related issues will slow down in the near future. The profession must begin taking deliberate steps to remedy the ethical issues created by Facebook. However, the objective of this note is not to address every issue presented by Facebook. Rather, the goal is to focus on one particular issue in the domain of judicial ethics.

III. JUDICIAL ETHICS IN THE GOOD OLD (FACEBOOK-LESS) DAYS

⁵³ *Id.* See Judy M. Cornett, *The Ethics of Blawging: A Genre Analysis*, 41 LOY. U. CHI. L.J. 221 (2009), for a more thorough discussion about ethical issues raised by lawyers blogging.

⁵⁴ *Help Center: Notes*, FACEBOOK, <http://www.facebook.com/help/?page=415> (last visited Mar. 20, 2011).

⁵⁵ John Schwartz, *A Legal Battle: Online Attitude Vs. Rules of Bar*, N.Y. TIMES, Sept. 13, 2009, available at <http://www.nytimes.com/2009/09/13/us/13lawyers.html>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *In re Terry*, No. 08-234, at 1 (N.C. Jud. Standards Comm’n Apr. 1, 2009), <http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf>.

⁵⁹ Facebook has, for better or for worse, turned “friend” into a verb. It means adding someone as a friend.

⁶⁰ *In re Terry*, No. 08-234, at 2.

⁶¹ *Id.*

⁶² *Id.* at 3.

Facebook creates numerous implications for judicial ethics; however, this note only concerns one: the relationship between the appearance of impropriety standard and Facebook friendship. Specifically, the fundamental question this note addresses is whether a Facebook friendship can, or should, ever create the appearance of impropriety. But what is “impropriety”? *Merriam-Webster* broadly defines impropriety as “the quality or state of being improper”.⁶³ Given the breadth of this term, just avoiding impropriety could be a heavy burden, but judges are required to do even more than that. They must also avoid acting in a way that may cause a reasonable observer to believe impropriety is afoot—regardless of whether the observer is right or wrong.⁶⁴ When established, the appearance of impropriety may force a judge to recuse herself from a matter, require the judge to be disciplined, or even change the outcome of an already-decided case.⁶⁵

To begin answering the question of whether Facebook friendships can create the appearance of impropriety, it is first necessary to delve into the background on the standard in the pre-Facebook world. This background will serve as the foundation for relating the appearance of impropriety standard to Facebook friendships. The notion that maintaining the appearance of propriety is almost as crucial as maintaining propriety itself is not new. Long before the appearance of impropriety standard was formally conceived in ethical codes, courts instructed judges to avoid “the very appearance of evil,” regardless of whether the judge was actually “honest in purpose.”⁶⁶

⁶³ *Impropriety Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/impropriety> (last visited Sept. 15, 2011).

⁶⁴ See MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007) (“A judge [. . .] shall avoid impropriety and the appearance of impropriety.”); *id.* at R. 1.2 cmt. 1 (“Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety.”).

⁶⁵ For background on judicial discipline under the appearance of impropriety standard, see Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914 (2010). For a background on recusal motions and retroactive recusal, see Kenneth M. Fall, Note, *Liljeberg v. Health Services Acquisition Corp.: The Supreme Court Encourages Disqualification of Federal Judges Under Section 455(a)*, 1989 WIS. L. REV. 1033 (1989).

⁶⁶ *Eastham v. Holt*, 27 S.E. 883, 894 (W. Va. 1897). See also *State ex rel. Att’y Gen. v. Lazarus*, 1 So. 361, 376 (La. 1887) (“‘All those who minister in the temple of justice [. . .] should be above reproach *and suspicion*. None should serve at its altar whose conduct is at variance with his obligations.’”) (emphasis added); One commentator traced this concept back to Saint Paul instructing the Thessalonians to “abstain from the appearance of evil.” McKoski, *supra* note 65, at 1920 n.27 (citing *In re Harriss*, 4 N.E.2d 387, 388 (Ill. 1936) (“[The 1924 Canons] were all succinctly summed up by St. Paul centuries ago when he advised the Thessalonians to abstain

However, to assess how Facebook friends fit into the appearance of impropriety standard, we need not look so far into the past. The development of the appearance of impropriety standard over the past ninety-five years began with its formal inception in the 1924 Canons of Judicial Ethics. This section includes a brief history of the appearance of impropriety standard and a more specific examination of how the standard has been applied to (non-Facebook) friends and acquaintances in the past. The relevant notions to gather from this section are: (1) the appearance of impropriety standard's increasing stringency since its original articulation in the Canons, and (2) the reasoning courts have used in applying the standard to various sorts of relationships.

A. The Appearance of Impropriety Standard's Increasing Stringency⁶⁷

Kenesaw Mountain Landis was a federal judge in the early 1920s who, wisely in his estimation, took a second job as a Major League Baseball commissioner to supplement his modest annual federal salary of \$7,500.⁶⁸ His new position paid an additional \$42,500 annually.⁶⁹ Prior to Landis' tenure as commissioner, the game had taken a dark turn.⁷⁰ Gambling and bribery were pervasive among major league insiders, most notably the Chicago White Sox, who notoriously threw the 1919 World Series.⁷¹ As commissioner, Landis wielded a heavy hand against perpetrators, famously banning the accused White Sox from the league.⁷² While the public hailed him as the "guardian"

from all appearance of evil."); *id.* (citing *Gantt v. Brown*, 134 S.W. 571, 571 (Mo. 1911) ("Yet we can with profit heed Paul's admonition: Abstain from all appearance of evil.")).

⁶⁷ The background discussion on the development of the appearance of impropriety standard in this section comes largely from the research done by the writers of two comprehensive articles on the subject: *McKoski*, *supra* note 65, and Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 *HOFSTRA L. REV.* 1337 (2006). Many of the footnotes in this section cite original sources and include some helpful quotes, but the original compilation of this research into historical narrative should, for the most part, be attributed to one of the aforementioned writers.

⁶⁸ Rotunda, *supra* note 67, at 1351.

⁶⁹ *Id.*

⁷⁰ See ELIOT ASINOF, *EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES* (1987).

⁷¹ McKoski, *supra* note 65, at 1921-1922. For an in-depth portrayal of the atmosphere of corruption surrounding baseball in the early 20th century, see ELIOT ASINOF, *EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES* (1987).

⁷² *Id.* at 1922.

of the national pastime, those in the legal profession raised ethical questions about Landis retaining his seat on the federal bench while simultaneously having such a position.⁷³

However, Landis' detractors could not find any law or ethical rule prohibiting his dual affiliation absent an actual misdeed.⁷⁴ Regardless, the American Bar Association adopted a resolution censuring Landis.⁷⁵ The ABA condemned Landis' dual employment as being, even in the absence of actual impropriety, a threat to the public's perception of a fair and impartial judiciary.⁷⁶ The Landis ordeal became a major catalyst for the ABA's creation of the 1924 Canons of Judicial Ethics.⁷⁷

In 1924, the ABA created a set of canons that encouraged judges to refrain from professional or personal conduct that would raise questions about the integrity of the judiciary.⁷⁸ Canon 4 enshrined the spirit of the ABA's censure against Landis. Titled "Avoidance of Impropriety," the canon advised judges that their "official conduct should be free from impropriety and the *appearance of impropriety*."⁷⁹ The remaining 1924 Canons elaborate on the general recommendations seen in Canon 4, advising judges, among other things, to avoid relationships that "may reasonably tend to awaken the suspicion that ... [such] relations or friendships" are capable of affecting judicial actions.⁸⁰

While the profession clamored for the Canons in the midst of the Landis controversy, they largely remained dormant for decades following their creation.⁸¹ That changed in 1969, when another controversy again spurred the ABA into action. Supreme Court Justice Abe Fortas received a consulting fee of \$20,000 from the Wolfson Family

⁷³ *Id.* at 1923.

⁷⁴ *See id.* (citing DAVID PIETRUSZA, JUDGE AND JURY: THE LIFE AND TIMES OF JUDGE KENESAW MOUNTAIN LANDIS 197 (1998) (discussing United States Attorney General A. Mitchell Palmer's report, which stated in part that "There seems to be nothing as a matter of general law which would prohibit a district judge from receiving additional compensation for other than strictly judicial service, such as acting as arbitrator or commissioner.")).

⁷⁵ *Bar Meeting Votes Censure of Landis*, N.Y. TIMES, Sept. 2, 1921, at 1.

⁷⁶ *Id.*

⁷⁷ *See* Rotunda, *supra* note 67, at 1351.

⁷⁸ *See* CANONS OF JUDICIAL ETHICS (1924); McKoski, *supra* note 65, at 1921; Rotunda, *supra* note 67, at 1352.

⁷⁹ CANONS OF JUDICIAL ETHICS Canon 4 (1924) (emphasis added).

⁸⁰ CANONS OF JUDICIAL ETHICS Canon 33 (1924). Other canons instruct the judges on the proper way to select judicial appointees (Canon 12), interfere with a child (Canon 15), grant continuances (Canon 18), and so on. The recommendation in Canon 4 to avoid the appearance of impropriety underlies all of these things.

⁸¹ McKoski, *supra* note 65, at 1926.

Foundation in return for his help in planning various foundation activities.⁸² Louis Wolfson, the Foundation's director, was under investigation by the Securities and Exchange Commission when the payment was issued, but Fortas only returned the money after Wolfson was indicted.⁸³ Fortas had violated no law, but, as with Landis, the mere appearance of the Justice's activities was enough to draw condemnation.⁸⁴ After a flurry of criticism from the press, Fortas ultimately resigned from the Court.⁸⁵

The ABA responded to the scandal by creating a committee, headed by California Chief Justice Roger Traynor, to strengthen the 1924 Canons. Canon 4 in the 1924 Canons became Canon 2 in the new "Model Code of Judicial Conduct," and stated that "[a] judge should avoid impropriety and the appearance of impropriety in all of his activities."⁸⁶ That is, the standard was no longer only tied to "official conduct," as in the 1924 Canons. Perhaps more importantly, the 1972 Code elevated the appearance standard to an enforceable rule of judicial conduct, where before it had been only aspirational in nature.⁸⁷

The Traynor Committee also made important changes to the disqualification rules. The committee expanded the limited scenarios where judicial disqualification was required under the 1924 Canons. The 1972 Code included a "catch-all" category of disqualification, which required disqualification when "[the judge's] impartiality might reasonably be questioned."⁸⁸ In the Reporter's Notes to the Code of

⁸² See *id.* at 1926-27 (citing Jake Garn & Lincoln C. Oliphant, *Disqualification of Federal Judges Under 28 U.S.C. § 455(a): Some Observations On and Objections to an Attempt by the United States Department of Justice to Disqualify a Judge on the Basis of His Religion and Church Position*, 4 HARV. J.L. & PUB. POL'Y 1, 22 (1981)).

⁸³ See *No Peace for Fortas*, TIME, May 9, 1969, at 28, 28. Fortas' former law partner, however, said the Justice returned the money because he "had been too busy with court affairs to do anything for the foundation." *Id.*

⁸⁴ E.g., McKoski, *supra* note 65, at 1927 (citing *Judgment on a Justice*, TIME, May, 23, 1969, at 23 (quoting Stanford's Gerald Gunther as stating "there is a question about the appearance of virtue on the court.")).

⁸⁵ McKoski, *supra* note 65, at 1928.

⁸⁶ CANONS OF JUDICIAL ETHICS Canon 4 (1924) (emphasis added).

⁸⁷ Although this was not limited to the appearance of impropriety standard—the entire code underwent this transformation. See Charles Gardner Geyh, *Roscoe Pound and the Future of the Future of the Good Government Movement*, 48 S. TEX. L. REV. 871, 878 (2007) ("Whereas the Canons of Judicial Ethics had been hortatory pronouncements that judges were free to follow or not, the 1972 Code's preamble declared that the Code was intended to establish mandatory standards that new state judicial conduct commissions and their respective supreme courts would be charged with enforcing.")

⁸⁸ CODE OF JUDICIAL CONDUCT Canon 3C(1) (1972).

Judicial Conduct, Professor E. Wayne Thode explained that “impropriety or the appearance of impropriety in violation of Canon 2” could “reasonably lead one to question the judge’s impartiality,” and therefore warrant disqualification.⁸⁹ Appearances were no longer just something judges ought to keep in mind; they now carried the threat of enforcement. As one commentator noted, “Appearances officially became, and would continue to be, the heart of judicial ethics.”⁹⁰

The crackdown continued. The ABA revised the Code again in 1990,⁹¹ further strengthening the appearance of impropriety standard. The 1990 Code replaced the “should” in Canon 2 with “shall” to resolve any remaining questions about whether the Canon was aspirational or mandatory.⁹² The drafters expanded the commentary to Canon 2 in several important ways. The new commentary explicitly reiterated that the rule applied to professional and personal conduct alike.⁹³ Moreover, it stipulated that “the test for appearance of impropriety is whether the conduct would create in *reasonable minds* a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.”⁹⁴ One commentator described the appearance of impropriety standard after the 1990 modifications as “relatively intact, albeit considerably amplified.”⁹⁵

The ABA suggested an overhaul of the 1990 Code during the ABA Commission on the 21st Century.⁹⁶ In response, the president of the ABA created the Joint Commission to Evaluate the Model Code of Judicial Conduct.⁹⁷ The utility and fairness of the appearance of impropriety standard was the subject of much debate. Some members of

⁸⁹ E. WAYNE THODE, REPORTER’S NOTES TO THE CODE OF JUDICIAL CONDUCT 60-61 (1973).

⁹⁰ McKoski, *supra* note 65, at 1930.

⁹¹ MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990).

⁹² *Id.* (“A Judge *Shall* Avoid Impropriety and the Appearance of Impropriety”) (emphasis added).

⁹³ *Id.* at Canon 2A cmt. (“The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge.”).

⁹⁴ *Id.* (emphasis added).

⁹⁵ McKoski, *supra* note 65, at 1931 (quoting LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 13 (1992)).

⁹⁶ ALFRED P. CARLTON, JR., AM. BAR ASS’N, JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY 57 (2003) (“The Commission recommends that the ABA undertake a comprehensive review of the *Model Code of Judicial Conduct*.”).

⁹⁷ McKoski, *supra* note 65, at 1931 (citing Mark I. Harrison, *The 2007 ABA Model Code of Judicial Conduct: Blueprint for a Generation of Judges*, 28 JUST. SYS. J. 257, 257 (2007)).

the Joint Commission viewed the standard as being too vague to be the source of discipline.⁹⁸ A 2004 draft retained the “appearance of impropriety” prohibition in Canon 1, but neglected to mention the standard in the black-letter rules following the Canon.⁹⁹ Moreover, the commentary added that “[o]rdinarily, when a judge is disciplined for engaging in conduct that creates an appearance of impropriety, it will be in conjunction with charges that the judge violated some other specific rule.”¹⁰⁰ This would have considerably scaled back the standard’s force. Accordingly, many viewed the proposed changes to the appearance of impropriety as the neutralization of a core tenant of judicial ethics.¹⁰¹ The ABA continuously reassured critics that the changes were not intended to undermine the appearance of impropriety standard from the 1990 Code, but their argument was justifiably unconvincing.¹⁰² The structure and language in the 2004 draft were difficult to reconcile with the strong language in Canon 2 of the 1990 Code. However, the reality is that the 2004 draft more accurately reflected the way most courts were actually applying the 1990 Code.¹⁰³

After some back and forth between the Joint Commission and outside critics, the ABA went beyond simply keeping the language of the 1990 Code; it strengthened the appearance of impropriety standard more than ever before. The appearance of impropriety standard be-

⁹⁸ See *id.* at 1932 (“Members of the Joint Commission would toil for three and one-half years over whether improper appearances should remain a basis for judicial discipline or be reassigned to the status of an unenforceable aspirational guideline.”).

⁹⁹ See MODEL CODE OF JUDICIAL CONDUCT Canon 1 (May 2004 draft) [hereinafter *2004 Draft*], available at http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/draft_canon1_051104.authcheckdam.pdf. See also McKoski, *supra* note 65, at 1932 (“This omission led many observers to conclude that the appearance standard was relegated to a hortatory status and could no longer form the basis of a disciplinary charge.”). To clarify, in the original Canons of Judicial Ethics, the canons were all there was. In the later codes, subsections appeared under each canon, which, in the view of some, were the enforceable parts of the Code. The 2007 Code made these subsections “rules.”

¹⁰⁰ See *2004 Draft*, *supra* note 99, Canon 1.01 cmt. 2.

¹⁰¹ See Rotunda, *supra* note 67, at 1356 (citing ABA JOINT COMM’N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, PRELIMINARY DRAFT, INTRODUCTORY REPORT, June 30, 2005, at 4 (“A majority of commentators on the subject ... urged that the concept be retained ”)).

¹⁰² McKoski, *supra* note 65, at 1932 (“ABA President Dennis Archer attempted to reassure critics by announcing that the Joint Commission had retained the mandatory and disciplinary nature of the standard and did not transform it into anything less.”).

¹⁰³ *Id.* at 1933. McKoski refers to, as one example, Indiana, where among the ten opinions between 1987 and 2007 that relied on the appearance of impropriety standard, none of them premised a violation solely on breaching the appearance of impropriety. *Id.* at 1965.

came part of Canon 1 in the 2007 Code, where it had been part of Canon 2 in the 1990 version.¹⁰⁴ Moreover, the 2007 Code included Rule 1.2 under Canon 1, stipulating that “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”¹⁰⁵ The standard was formally enshrined in a black-letter rule, in addition to its place in the canons.¹⁰⁶ This left no question about the enforceability of a disciplinary action premised entirely on the appearance of impropriety.

The expansion of the appearance of impropriety standard under the 2007 Model Code is not without critics. Rotunda describes the appearance of impropriety standard, particularly since the 2007 modifications, as being intolerably vague and exploitable.¹⁰⁷ McKoski describes the 2007 Code as unfavorably “elevat[ing] the appearance of impartiality over actual impartiality.”¹⁰⁸ Their views, however, are hardly universal. Other scholars have been critical of the judiciary’s lenient take on ethical rules,¹⁰⁹ and emphasize the many benefits of the appearance of impropriety standard.¹¹⁰

To summarize, the appearance of impropriety standard began as little more than a recommendation for how a judge should conduct

¹⁰⁴ The appearance of impropriety had moved from Canon 4 in 1924 to Canon 2 in 1972, and then from Canon 2 to Canon 1 in the 2007 Code. This progression also arguably evidences the standard’s increasing prominence. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007).

¹⁰⁵ MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2007) (emphasis added).

¹⁰⁶ *Id.* *See* Eastham v. Holt, 27 S.E. 883, 894 (W. Va. 1897) (“Such excessive power, though honest in purpose, should be denied because in unscrupulous hands it might be used to further dishonest ends. To keep the fountain of justice pure and above reproach, the very appearance of evil should be avoided.”).

¹⁰⁷ *See* Rotunda, *supra* note 67, at 1361 (“Yet the ABA has armed every disgruntled litigant with the means to tear down a judge’s reputation by arguing that, ‘even if what you did was not wrong, it appeared wrong to me, and so you violated the appearance of impropriety.’”).

¹⁰⁸ *See* Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from “Big Judge Davis”*, 99 KY. L.J. 259, 290 (2010).

¹⁰⁹ *See* Leslie W. Abramson, *The Judge’s Relative Is Affiliated with Counsel of Record: The Ethical Dilemma*, 32 HOFSTRA L. REV. 1181, 1200 (2004) (“Judges may not recuse themselves as frequently as may be necessary to preserve public confidence in the judiciary.”).

¹¹⁰ *See* Cynthia Gray, *Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility*, 28 U. ARK. LITTLE ROCK L. REV. 63, 101 (“The appearance of impropriety standard, both as a symbol and an enforcement tool, is an essential component of that effort and perfectly comprehensible by a thoughtful judge and readily embraced by an upright judge.”). *See also* McKoski, *supra* note 65, at 1962 (discussing many of the arguments for an appearance of impropriety standard).

herself in a professional setting.¹¹¹ It essentially laid dormant for decades, until the 1972 Code elevated it from a recommendation to a mandatory requirement, and one that applied to all a judge's activities, not just professional ones.¹¹² The 1990 Code further amplified the standard's strength by resolving some semantic ambiguities.¹¹³ However, regardless of the ABA's increasingly stringent language with respect to the appearance of impropriety, some questions still remained about whether the appearance of impropriety standard was individually enforceable.¹¹⁴ The 2007 Model Code finally put the issue to bed, at least for the ABA, by adding the appearance of impropriety to Rule 1.2, and stipulating that all rules are individually enforceable.¹¹⁵ How states choose to implement and interpret the new language of the 2007 Code, however, largely remains to be seen.¹¹⁶

B. Friendship Under the Appearance of Impropriety Standard

While the concept of impropriety is broad, the focus of this paper is quite narrow. In investigating whether Facebook friendships are capable of creating the appearance of impropriety, it is necessary to discuss how courts and ethical committees have assessed real-world friendships under the appearance of impropriety standard in the past. Precedent on real-world relationships and the appearance of impropriety will provide a valuable framework for applying the standard to Facebook friendships.

But, how do friendships create the appearance of impropriety? Analyzing something that gives rise to the appearance of impropriety is a matter of (1) identifying the potential underlying impropriety and (2) discovering the conditions where a court or ethical committee will

¹¹¹ See *supra* notes 72–85 and accompanying text.

¹¹² See *supra* notes 86–95 and accompanying text.

¹¹³ See *supra* notes 96–100 and accompanying text.

¹¹⁴ See McKoski, *supra* note 65, at 1932 (“ABA President Dennis Archer attempted to reassure critics by announcing that the Joint Commission had retained the mandatory and disciplinary nature of the standard and did not transform it into anything less.”).

¹¹⁵ See *supra* notes 101–111 and accompanying text.

¹¹⁶ Only a few states have modified their codes of judicial ethics to adopt the ABA's 2007 changes so far. See *infra* note 167. The Model Code of Judicial Ethics is, of course, just a *model* code. States have to adopt the language in their own codes for it to be enforceable. While almost all states have adopted the ABA's past code changes this has yet to happen with the 2007 Model Code. *E.g.*, JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS 3 n. 19 (3d ed. 2000) (stating that 47 states adopted the 1972 Code after its promulgation). If the past is any indication, more and more states will continue adopting the 2007 Code.

find it reasonable for an observer to infer that such an impropriety exists, even if it does not. Essentially, the potential underlying impropriety is the improper conduct that the judge would be guilty of if the reasonable observer's suspicions were correct. There can be no "appearance" of impropriety if the alleged conduct would not be improper even if proven. The second prong describes those circumstances where a court acknowledges that the potential underlying impropriety could be reasonably inferred, and therefore the judge's conduct should be prohibited regardless of whether the potential underlying impropriety actually exists or not.

With respect to friendship and the appearance of impropriety, there are two potential underlying improprieties. The first is that the judge exhibits bias towards the friend or acquaintance in a proceeding. This is perhaps the most intuitive, and the predominant focus of this paper. The second potential underlying impropriety is that the judge is not a particularly upstanding citizen; for example, the associate of various nefarious characters. As for the conditions under which one of these improprieties may be inferred, the bulk of the analysis, there are no straight-forward answers.¹¹⁷

It is certainly not the case that every friendship gives rise to the inference of impropriety.¹¹⁸ Unfortunately, there is not a single test to determine whether the circumstances exist for a court to find the appearance of impropriety; the innumerable forms of social relations necessitate a case-by-case inquiry.¹¹⁹ Moreover, different states reach different conclusions about the appearances of various relationships in similar circumstances.¹²⁰ Still, there are several factors that states—

¹¹⁷ When judicial bias is the underlying issue, there is substantial overlap. For instance, looking at the 2007 Model Code of Judicial Ethics, Canons 2 and 4 explicitly concern "impartiality," while "impropriety" is defined in the code as "conduct that undermines a judge's ... impartiality." Perhaps one question is: "why address this solely under the appearance of impropriety if the duty of impartiality is really what's at issue?" The reason is that this paper is concerned with addressing how courts will look at Facebook friendships primarily absent proof of actual bias, and that is really an "appearance of impropriety" question. Still, some literature discusses the "appearance of *partiality*," which seems, at first glance, like it might be more relevant for this topic. However, this concept is really a less-developed sub-category of the broader appearance of impropriety standard. *See infra* note 120 (emphasis added).

¹¹⁸ *E.g.*, *Schupper v. People*, 157 P.3d 516, 517 (Colo. 2007) (holding that the "the mere existence of a trial court judge's friendship with a member of a prosecution team, by itself, does not create... the appearance of impropriety.").

¹¹⁹ *Id.* ("[W]e must look to the specific circumstances of the case in order to determine whether the closeness of that friendship ... require[s] the judge's disqualification.").

¹²⁰ This has produced an appearance of impropriety jurisprudence that is very confusing. *See, e.g.* Rotunda, *supra* note 67, at 1369 ("This analysis[.] referring to an Ohio ethics opinion on the appearance of impropriety, 'is about as helpful as John

with at least some consistency— use to assess friendships and determine whether it would be reasonable for an observer to infer that a potential underlying impropriety exists.¹²¹ Courts determine whether or not the mere existence of a specific relationship is capable of creating the appearance of impropriety by evaluating the factors of closeness, control, and disclosure.

1. Closeness

Predictably, one factor courts and ethical committees consider is the “closeness” of the friendship. Certain relations are so close that they obviously create the appearance of impropriety.¹²² Family members, business partners, lovers—these relationships require little explanation when a court finds a violation of the appearance of impropriety standard. Accordingly, judges have been relatively good about recusing themselves in a timely fashion when these kinds of relationships are at issue.¹²³ However, there is a different class of relationship, of which the Facebook friendship is arguably a part, which occupies a

Wayne’s advice: ‘A man’s gotta do what a man’s gotta do.’” (other citations omitted)).

¹²¹ While we see many of these factors used across various states in similar circumstances, that is not to suggest there is uniform interpretation of social relationships under the appearance of impropriety standard. Often there are gross inconsistencies with the application of the standard, even in the same state. *See, e.g.* Jeffrey T. Fiut, *Recusal and Recompense: Amending New York Recusal Law in Light of the Judicial Pay Raise Controversy*, 57 Buff. L. Rev. 1597, 1622 (2009) (discussing countervailing holdings on the appearance of impropriety and social relationships in New York).

¹²² *See In re Pekarski*, 639 A.2d 759, 762 (Pa. 1994) (holding that “because of the impossibility of conveying the extent of that relationship ‘the judge should have ‘preliminarily recused herself[.]’”); *In re Turney*, 311 Md. 246, 247 (Md. 1987) (censuring a judge for presiding over an individual who was his former wife’s stepson and the friend of his own son because it created the appearance of impropriety); *see also* Leslie W. Abramson, *The Judge’s Relative Is Affiliated with Counsel of Record: The Ethical Dilemma*, 32 HOFSTRA L. REV. 1181, 1186 (2004) (“An appearance of impropriety is created by the close nature of the marriage relationship.”).

¹²³ A search on LexisNexis reveals very, very few cases concerning recusal and familial or business relationships. Perhaps the closest is *In re Turney*, *supra* note 122. *See also* Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 968-70 (1996) (discussing other cases involving close relationships and the appearance of impropriety). Generally, cases concerning the appearance of impropriety and these kinds of relationships arise because the relationship calls into question whether the judge can continue to hold office at all. *E.g.*, *Smith v. Beckman*, 683 P.2d 1214 (Colo. App. 1984) (holding that a county judge’s marriage to a deputy district attorney created the appearance of impropriety, even though she only handled matters in the district court and took great lengths to insulate herself from county court cases).

gray area. Investigating how courts and ethical committees have assessed these sorts of relationships in the past will shed light on how they will treat Facebook friendships in the future.

One way courts have considered the closeness of a relationship is by looking at the present level of social involvement. In *Schupper v. People*, Sanford Schupper, who was accused of felony theft, filed several motions to disqualify Judge Larry Schwartz, but Schwartz denied them all.¹²⁴ Schupper was convicted, and subsequently appealed.¹²⁵ During appeal, Schupper moved to disqualify Schwartz from four independent criminal cases filed against him.¹²⁶ This time Schwartz granted the motion, on account of his former supervisor having recently entered the case on the side of the prosecution.¹²⁷ While Schwartz “consider[ed] him a friend,” he had “little social involvement at present.”¹²⁸ Still, he admitted, “under these present circumstances it would create an appearance of impropriety if I retain these cases.”¹²⁹ The issue was whether the disqualification should be retroactively applied to Schupper’s prior conviction.¹³⁰ In adopting the *per se* rule, the trial court held that the “mere existence of the friendship required disqualification.”¹³¹

After reversal in the appellate court, the Supreme Court of Colorado rejected the *per se* rule for a more fact-intensive alternative. The court stated that whether disqualification was required depended on “the closeness of the relationship *and* its bearing on the underlying case.”¹³² For the court, Schwartz’ friendship with the member of the prosecution was insufficiently close because the two had “little social involvement at present.”¹³³ The court held that a friendship “devoid of current social involvement” did not rise to the level of closeness capable of creating the appearance of impropriety.¹³⁴

¹²⁴ *Schupper v. People*, 157 P.3d 516, 518 (Colo. 2007).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Tensions had risen considerably between the Schwartz and Schupper’s attorney, even before the appearance of Schwartz’ friend. Schwartz described the trial as becoming “something of a personal grudge match.” *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 520.

¹³² *Id.* (emphasis added).

¹³³ *Id.* See also *United States v. Lovaglia*, 954 F.2d 811, 816 (2d Cir. 1992) (stating that while the judge and victim’s family had been “very close socially,” it was “important that [they] view[ed] [the friendship] in its temporal context.” The judge had no contact with the victim’s family for around eight years prior to the case.).

¹³⁴ *Schupper*, 157 P.3d at 520-21.

In the same vein, a Louisiana court assessed the closeness of a friendship by looking at the frequency of communication between a judge and a third party. Daniel O'Neill sued a building owner, Newton Thibodeaux, for injuries sustained by falling over a railing.¹³⁵ After a verdict for Thibodeaux, O'Neill motioned for a new trial, alleging that the trial judge should have disqualified himself because he occasionally attended card parties with Thibodeaux and one of the witnesses.¹³⁶ The court of appeals found no error for several reasons, chief among them "[t]he fact that the trial judge plays cards with Thibodeaux several times a year" did not constitute a close enough relationship to require disqualification.¹³⁷ Essentially, the court found that an acquaintance consisting of infrequent contact through a game of cards was not close enough to create an appearance of impropriety.¹³⁸

This same framework appears in judicial ethics advisory opinions. The Delaware Judicial Ethics Advisory Committee responded to a judge inquiring about whether he could hear emergency *ex parte* petitions from the Division of Family Services given his friendship with one of the lawyers representing the division.¹³⁹ The question was whether the judge could hear petitions from other lawyers in the division.¹⁴⁰ The committee pointed out that merely identifying the friend as "close," as the judge did in his initial letter, was not enough to determine whether the appearance of impropriety existed.¹⁴¹ Upon further investigation, the committee found that the judge and lawyer socialized frequently, and the lawyer sometimes babysat for the judge's children.¹⁴² Ultimately, the court found that the judge presiding over other lawyers in the division did not create ethical problems.¹⁴³ Importantly, the committee assessed closeness of the friendship by focusing almost entirely on the frequency of social interaction.¹⁴⁴

2. Control

¹³⁵ O'Neill v. Thibodeaux, 709 So. 2d 962, 964 (La. Ct. App. 3d Cir. 1998).

¹³⁶ *Id.* at 965.

¹³⁷ *Id.* at 968.

¹³⁸ *Id.*

¹³⁹ Del. Judicial Ethics Advisory Comm., JEAC 2002-2, at 1 (Feb. 27, 2002).

¹⁴⁰ *Id.* at 2. (The judge correctly assumed he could not preside over proceedings actually involving the friend. Doing so would have certainly created the appearance of impropriety.).

¹⁴¹ *Id.* at 4.

¹⁴² *Id.*

¹⁴³ *See id.*

¹⁴⁴ *See id.*

Courts and ethical committees have not limited their analysis to the relationship itself; the context of the relationship is also highly relevant. Sometimes the creation and continuation of an acquaintance is more a product of the social atmosphere than it is the volitional choice of the parties involved. In other words, certain circumstances can make one's friendships or acquaintances practically inevitable, and therefore the prohibition of such relationships would be unfairly burdensome. The degree of control a judge has over the creation and continuation of a relationship is something courts and ethical committees have given considerable weight.

Some courts have placed emphasis on geographical factors and considered the practicality of mandating recusal for certain kinds of relationships. The court in *O'Neill v. Thibodeaux* did not focus solely on the closeness of the relationship between Judge O'Neill and his card buddies. The size of the city where the parties resided was also instrumental in the court's decision.¹⁴⁵ The Louisiana court commented that "it would be impossible for a judge to remain aloof in small towns ... where most people know each other."¹⁴⁶ Essentially, if the kind of acquaintances at issue in the case demanded recusal, judges in small towns would have to recuse themselves from virtually every case, since in small towns, "most people know each other, especially the judges."¹⁴⁷ The court thought a finding that the relationship between the judge and Thibodeaux met the appearance of impropriety standard would effectively require judges to "live their lives in a vacuum."¹⁴⁸

In *United States v. Heffington*, five defendants appealed convictions for manufacturing methamphetamine.¹⁴⁹ The defendants argued that their Fourth Amendment rights were violated because the judge who issued the warrant that exposed their methamphetamine operation was not "neutral and detached," as required by law.¹⁵⁰ The judge had

¹⁴⁵ See 709 So. 2d 962 (La. Ct. App. 3d Cir. 1998) .

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* The procedure of the whole affair was also important to the court's decision. "At that time, the plaintiffs had the option to ask for the trial judge's recusal, explore the relationship on the record, or accept the trial judge for the duration. Plaintiffs were obviously content with the trial judge's disclosure and their decision until the trial concluded unfavorably to them." *Id.* See also *Jorgensen v. Cassidy*, 320 F.3d 906, 912 (9th Cir.2003) (finding no appearance of impropriety because "Judge Munson is the only federal district court judge in the Commonwealth. It is quite likely that Judge Munson is acquainted with most of the lawyers who regularly appear in his court.").

¹⁴⁸ *O'Neill*, 709 So. 2d at 968.

¹⁴⁹ *United States v. Heffington*, 952 F.2d 275, 277 (9th Cir. 1991).

¹⁵⁰ *Id.* at 277-78 (citing *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 327 (1979)).

represented one of the defendants in another case involving methamphetamine almost a decade prior.¹⁵¹ While the court did not directly consider the appearance of impropriety standard, it did discuss the closely related concept of the “appearance of partiality.”¹⁵² The size of the community was one of the major focal points of the court’s assessment. For the *Heffington* court, the fact that rural judges inevitably know more about local criminals than most of their urban colleagues was insufficient to create an appearance of partiality.¹⁵³ The court quipped, “[W]e are not prepared to disqualify small-town judges on demand.”¹⁵⁴

Other courts have adopted a broader approach. In an advisory opinion, the Alabama Judicial Inquiry Commission drew a distinction between relationships that judges have some control over and those that they do not, the former being those that generally create the appearance of impropriety.¹⁵⁵ The Commission explained that “a judge cannot control the church the friend attends or the stores at which the friend shops,” and therefore judges should not be required to alter their behavior to avoid the appearance of impropriety with respect to those situations.¹⁵⁶ Still, the Commission cautioned, a judge can “control the degree of his or her interaction with the friend in such public venues” and should “make certain that his or her actions do not create an appearance of impropriety.”¹⁵⁷

¹⁵¹ *Id.* at 278.

¹⁵² *Id.* at 279. See also Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonably Be Questioned”*, 14 GEO. J. LEGAL ETHICS, 2001, at 55, 70 (Author describes the “appearance of partiality” as essentially being under the umbrella of the appearance of the impropriety standard, and suggests that the only distinction is that the “appearance of impropriety” refers to a duty of the judges, where the “appearance of partiality” refers to the right of third parties to enforce that duty in one particular instance. Further, “To avoid the appearance of *impropriety*, the judge should be the first to raise the issue by recusing in a particular case ... [o]n the other hand, when a party seeks the trial judge’s recusal for the appearance of *partiality*, appellate decisions are divided about whether the judge’s personal views matter.”) (emphasis added).

¹⁵³ See *Heffington*, 952 F.2d at 279.

¹⁵⁴ *Id.*

¹⁵⁵ Ala. Judicial Inquiry Comm’n, Op. 97-657, ALABAMA’S LEGAL INFORMATION CENTER (June 27, 1997), <http://www.alalinc.net/jic/opinions/ao97-657.htm>. See also *Moran v. Clarke*, 296 F.3d 638, 649 (8th Cir. 2002) (focusing on a judge’s “reciprocal visits” with a friend).

¹⁵⁶ Ala. Judicial Inquiry Comm’n, Op. 97-657.

¹⁵⁷ *Id.* See also Steven Lubet, *Judicial Impropriety: Love, Friendship, Free Speech, and Other Intemperate Conduct*, 1986 ARIZ. ST. L.J. 379, 387 (1986) (arguing that there is a distinction between private behavior and public behavior, the latter being what a judge has greater control over).

The Alabama Commission relied heavily on a New Jersey case in its reasoning, which itself provides insight into this theory. In *In re Blackman*, the Supreme Court of New Jersey reprimanded a judge for the appearance of impropriety because he attended the wrong cook-out.¹⁵⁸ Judge Robert Blackman, with apparently nothing but good intentions, attended Thomas Heroy's Mother's annual Labor Day cook-out.¹⁵⁹ This was problematic because Thomas Heroy had recently been convicted of racketeering.¹⁶⁰ Although the two men had been friends for years, the court premised Judge Blackman's reprimand on his choice to attend the cookout.¹⁶¹ The court noted, "When a judge chooses to attend a party hosted by a convicted criminal, [it] could be perceived as evidencing sympathy for the convicted individual or disagreement with the criminal justice system that brought about the conviction."¹⁶² It was the judge's choice to attend the cookout—rather than the prior existence of the relationship—that created the appearance of impropriety; the judge was powerless against the fact that his friend had committed a crime, but he could control whether or not he attended the barbeque.

3. Disclosure

Finally, courts have considered whether the judge disclosed the relationship at issue prior to a dispute. Generally, disclosure serves to supplement the court's analysis—it does not automatically absolve any appearance of impropriety, nor is lack of disclosure necessarily fatal.¹⁶³ Unlike the other two factors, disclosure is not so convoluted as to require detailed discussion. For the purposes of this paper, it suffices to say that disclosure is sometimes required,¹⁶⁴ and always

¹⁵⁸ *In re Blackman*, 591 A.2d 1339, 1340 (N.J. 1991).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1341, 1342.

¹⁶² *Id.* See also *id.* at 1342 ("His presence at the party was the subject of public scrutiny, not his feelings of friendship for Heroy.").

¹⁶³ See, e.g., *Abramson*, *supra* note 152, at 69 ("When a judge fails to disclose information to the parties that the judge knew or should have known, this failure to disclose could provide the basis for a motion to disqualify. However, the case law is split on this issue. Some cases suggest that an appellate court should remand the case.... Other courts have concluded that failure to make a timely disclosure either does not raise an appearance of partiality or renders an ethical violation effectively harmless.").

¹⁶⁴ E.g., *Stevenson v. State*, 782 A.2d 249, 257 (Del. 2001) (finding that "[w]henver there are facts or circumstances, however, that have the potential to create the appearance of impropriety or partiality, a judge must disclose those facts promptly....").

helpful to the judge's case.¹⁶⁵ As one would expect, most issues with the appearance of impropriety standard arise when a judge neglects to disclose a relationship.¹⁶⁶

IV. FITTING FACEBOOK FRIENDSHIP INTO THE APPEARANCE OF IMPROPRIETY STANDARD

This section merges the discussions on Facebook friendships and the appearance of impropriety standard, and attempts to answer three separate questions: (1) what *have* courts and ethical committees said about Facebook friendships and the appearance of impropriety; (2) what *will* they say; and (3) what *should* they say?

A. States That Have Spoken on the Subject

Several states have issued advisory opinions pertaining to Facebook use and judicial officers. These opinions provide probative value in predicting the way courts will handle Facebook in disciplinary actions and cases, but it is still important to keep in mind their purely advisory nature. While advisory opinions have some precedential value, they are generally not binding in court.¹⁶⁷ Moreover, each of the opinions were solicited by judges voluntarily inquiring into whether their own actions could give rise to discipline. As such, disclosure of the relationship at issue is inherent in all of the opinions, and as previously discussed, courts view disclosure quite favorably.¹⁶⁸ It is perfectly conceivable that even a jurisdiction with a relatively lenient advisory opinion concerning Facebook friendships could come down hard on a judge if an ethical case arose and there was no disclosure.

Florida has arguably been the most vocal about ethical problems created by judicial Facebook friendships, and has certainly taken the

¹⁶⁵ *E.g.*, *O'Neill v. Thibodeaux*, 709 So. 2d 962, 968 (La. Ct. App. 3d Cir. 1998) (holding that "[i]f we could find fault with the trial judge ... it would be that he did not make a record of his disclosure. However, [he] did make such a disclosure prior to trial, albeit in chambers."). *See also* *Moran v. Clarke*, 296 F.3d 638, 649 (8th Cir. 2002) (remanding in part because the court found it "particularly worrisome [that] the district court[] fail[ed] to disclose this conflict himself").

¹⁶⁶ *E.g.*, *In re Turney*, 533 A.2d 916, 916 (Md. 1987).

¹⁶⁷ Honorable Howland W. Abramson & Gary Lee, *Judicial Ethics Advisory Committees Should Render Opinions Which Adhere to Binding United States Constitutional Precedents*, 41 DUQ. L. REV. 269, 269 n.1 (2003) ("In most jurisdictions, such judicial ethics advisory opinions are not binding, but may be considered as a defense or in mitigation of discipline.") (citing J. SHAMAN, ET. AL., JUDICIAL CONDUCT AND ETHICS 1.11 (3d ed. 2000)).

¹⁶⁸ *See supra* Part III(B)(3).

strongest stance. As a preliminary matter, Florida's Code of Judicial Conduct differs from the 2007 Model Code. Florida's Canon 2 stipulates that a judge "Shall Avoid ... the Appearance of Impropriety in all of the Judge's Activities."¹⁶⁹ Subsections under Canon 2 enumerate some specific instances Florida considers capable of creating the appearance of impropriety.¹⁷⁰ The discussion on Facebook friendships predominately focuses on Canon 2B, which states, in part, that a judge shall not "convey or permit others to convey the impression that they are in a special position to influence the judge."¹⁷¹

The Florida Judicial Ethics Advisory Committee first considered the issue in a 2009 advisory opinion, responding to a question about whether a judge could "friend" lawyers who appear before her in court.¹⁷² The Committee answered in the negative, stating that these kinds of judge-lawyer Facebook friendships were enough to create the appearance of impropriety under Canon 2B.¹⁷³ The opinion lacked lengthy substantive discussion, but the Committee did emphasize the ability of the judge to control who her Facebook friends were.¹⁷⁴

The Florida Committee reiterated its position and elaborated on its explanation in another advisory opinion in 2010.¹⁷⁵ Curiously, the Committee acknowledged that in Florida, "[a] mere friendship between a judge and an attorney who practices before that judge, without more, does not create the appearance of impropriety," while maintaining that "the majority continues to believe that allowing lawyers who practice before a judge to appear as 'friends' on the judge's Facebook page ... conveys the impression ... Canon 2B prohibits."¹⁷⁶

¹⁶⁹ *Florida Code of Judicial Conduct Canon 2*, FLORIDA SUPREME COURT, http://www.floridasupremecourt.org/decisions/ethics/09-15-2008_Code_Judicial_Conduct.pdf (last visited Sep. 10, 2011) (The structure is virtually identical to the 1990 Model Code of Judicial Conduct).

¹⁷⁰ *Id.* at Canon 2B.

¹⁷¹ *Id.*

¹⁷² *See Florida Judicial Ethics Advisory Committee Opinion 2009-20*, SIXTH JUDICIAL CIRCUIT OF FLORIDA, <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html> (Nov. 17, 2009).

¹⁷³ *Id.* ("The Committee believes that listing lawyers who may appear before the judge as 'friends' on a judge's social networking page reasonably conveys to others the impression that these lawyer 'friends' are in a special position to influence the judge.")

¹⁷⁴ *Id.*; *see also supra* Part III(B)(2) (similar to the "control" factor discussed with respect to friendship).

¹⁷⁵ *See Florida Judicial Ethics Advisory Committee Opinion 2010-06*, SIXTH JUDICIAL CIRCUIT OF FLORIDA, <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-06.html> (Mar. 26, 2010).

¹⁷⁶ *Id.*

In a sense, the Committee found Facebook affiliation more troublesome than some real-world acquaintances. The Committee worried that allowing these online friendships would “create[] a class of special lawyers who have requested this [friendship] status” that would appear to have a special relationship with the judge, over those lawyers who decline to friend a judge or refrain from using social networking sites altogether.¹⁷⁷ A minority opinion, however, expressed reservations about extending the appearance of impropriety to Facebook friendships.¹⁷⁸ The opinion also had vocal critics outside Florida.¹⁷⁹

Under a virtually identical Code of Judicial Conduct, Kentucky took a less rigid stance on the Facebook question. In an advisory opinion, the Kentucky Judicial Ethics Committee concluded that a Facebook friendship between a judge and lawyer who may appear before her in court “by itself, does not reasonably convey to others an impression that such persons are in a special position to influence the judge.”¹⁸⁰ The Committee recommended that a judge should be “extremely cautious” with Facebook activity.¹⁸¹ The Committee described two “extremes” on the continuum of relationships between judges and third parties, one a complete unfamiliarity with the person outside the courtroom and the other a “close personal relationship.”¹⁸² At some point between these two extremes, the Committee explained, the appearance of impropriety may arise; the implication being that Facebook friendships could be capable of creating an appearance of impropriety in some instances.¹⁸³

Several other states have issued opinions similar to Kentucky’s. In fact, Kentucky cited and relied on a New York ethics committee opinion, which likened adding Facebook friends to “adding the person’s

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* (“Social networking sites have become so ubiquitous that the term ‘friend’ in the internet social networking world does not have the same meaning that it did in the pre-internet age.”).

¹⁷⁹ *E.g.*, John Schwartz, *For Judges on Facebook, Friendship Has Limits*, N.Y. TIMES, Dec. 11, 2009, at A25 (NYU’s Stephen Gillers addressed the Florida Supreme Court ethics advisory opinion, and stated “In my view, they are being hypersensitive.” However, a Florida judge thought the ruling was “probably a good idea, just to avoid any perceptions of impropriety.”).

¹⁸⁰ Ethics Comm. of the Ky. Judiciary, Op. JE-119 (Jan. 20, 2010).

¹⁸¹ *See id.* at 5.

¹⁸² *See id.* at 2.

¹⁸³ *See id.* (“[. . .] this Committee believes that judges should be mindful of ‘whether on-line connections alone or in combination with other facts rise to the level of ‘a close social relationship’ which should be disclosed and/or require recusal.”) (quoting N.Y. Comm’n on Judicial Conduct Opinion, *infra* note 184).

contact information into the judge's Rolodex."¹⁸⁴ The only difference, according to the New York ethics committee, is the "public nature of such a link ... and the increased access that the person would have to any personal information ... creates the appearance of a stronger bond."¹⁸⁵ Additionally, the Ohio Board of Commissioners on Grievances and Discipline opined that a "social network 'friend' may or may not be a friend in the traditional sense of the word."¹⁸⁶ Kentucky, New York, and Ohio have all issued advisory opinions stating that judges could maintain Facebook friendships, even with lawyers, so long as it is—in the words of the Ohio opinion—"done carefully."¹⁸⁷

Notably, South Carolina has taken the most liberal stance, issuing a very brief advisory opinion stating that a judge may "be friends with law enforcement officers and employees of the Magistrate as long as they do not discuss anything related to the judge's position"¹⁸⁸ This opinion, unlike the others, seems to entirely foreclose the possibility of a Facebook relationship itself ever creating an appearance of impropriety.

B. Analogizing Past Doctrine

The advisory opinions concerning Facebook friendships are light on substance¹⁸⁹ and lack the kind of fact-intensive analysis seen in other appearance of impropriety cases. State ethics committees have only offered general recommendations about Facebook use with the appearance of impropriety in mind. It is still unknown how courts will apply appearance of impropriety precedent in an actual ethics case

¹⁸⁴ N.Y. Comm'n on Judicial Conduct, Op. 08-176 (January 29 2009), *available at* <http://www.courts.state.ny.us/ip/judicialethics/opinions/08-176.htm>.

¹⁸⁵ *Id.*

¹⁸⁶ Ohio Bd. Of Comm'rs on Grievances & Discipline, Op. 2010-7 (Dec. 3, 2010), *available at* http://www.sconet.state.oh.us/Boards/BOC/Advisory_Opinions/display.asp. Interestingly, Ohio's stance is less-stringent, and yet it is the only state that has issued an opinion on the topic and adopted the language of the 2007 Model Code of Judicial Conduct. On the other hand, Florida has taken a stronger stance even though, on paper, it has a less rigorous appearance of impropriety standard. This is a valuable example of the ongoing interpretative difficulties with the appearance of impropriety.

¹⁸⁷ *Id.* at 7.

¹⁸⁸ S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009 (Oct. 2009), *available at* <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009>.

¹⁸⁹ All of the opinions discussed above address the broad question of whether lawyers and judges can be Facebook friends, and, in turn, provide very general advice.

involving Facebook. This section discusses the cases previously mentioned in Part III(B) concerning the appearance of impropriety and friendship, and further investigates how courts may apply this precedent to Facebook relationships in the near future.

Based on how courts have assessed closeness in the past, Facebook friendships may create the appearance of impropriety even when non-Internet acquaintances would not. In *Schupper*, the court did not find sufficient “closeness” between the judge and the third party because the two had little present social involvement.¹⁹⁰ Using this framework, numerous real-world relationships fall outside the scope of the appearance of impropriety.

However, Facebook complicates the issue. Friends or acquaintances who otherwise have little social involvement may routinely contact each other on Facebook. The question becomes: at what point do they become socially involved? Many Facebook friends continue to keep in touch directly through Wall posts, Facebook messages, and other Facebook features. Others keep in touch indirectly by tracking their Facebook friends’ profile pages for updates over time. In either case, there is certainly an argument that these types of Facebook-friend interactions preserve the social involvement of the two parties.

In the Facebook era, it is perfectly conceivable that courts using the *Schupper* reasoning could find Facebook friendships create the appearance of impropriety even when friendships have stagnated or were never fully established. Fewer and fewer friendships fade into the past when you can constantly communicate via Facebook, even to the most casual of acquaintances. For instance, a birthday, once considered an intimate affair, has become an occasion when hundreds, if not thousands, of Facebook friends send their best wishes. If “present social involvement” is the measure of closeness, then Facebook friendships are problematic. Facebook is, after all, a “social” networking site.

The court’s reasoning in *O’Neill* is likewise complicated by Facebook’s introduction into the equation. In *O’Neill*, the court held that the occasional card game involving the judge and two individuals involved in a case was not enough to create the appearance of impropriety because, in the eyes of the court, the nature and frequency of the contact did not make the individuals sufficiently close.¹⁹¹ With Facebook, people who rarely, if ever, interact face to face could communicate with one another quite frequently, whether it be by com-

¹⁹⁰ See *Schupper*, 157 P.3d at 517.

¹⁹¹ See *O’Neill*, 709 So. 2d at 968.

menting on, or “liking” a status, playing “Mafia Wars,”¹⁹² or via any other of Facebook’s innumerable communication mediums. Furthermore, these Facebook interactions are, in some sense, even more intimate than the card game at issue in *O’Neill*. Meeting to play cards is a group activity. Individuals can attend the same social gathering for years with little direct interaction. Facebook interaction, however, is generally one-on-one. Had O’Neill and Thibodeaux been Facebook friends, it is certainly possible the case could have come out the opposite way. It would be difficult for the court to focus on the long gaps between card games if they were punctuated with even casual Facebook contact.

Facebook friendships have become particularly troublesome for those courts that focus on the level of control the judge has over the relationship at issue.¹⁹³ While a judge may have limited control over his acquaintances within a small town,¹⁹⁴ or with those who attend his church,¹⁹⁵ he has complete control over whether he creates a Facebook profile and, if he does, who he “friends”. Even after approving a Facebook friendship, the judge retains absolute control over his privacy settings—if he does not want anyone commenting on anything, he can adjust his settings accordingly. With troublesome Facebook friendships being unnecessary and easily avoidable, it is difficult imagining courts that focus on the level of control in relationships not faulting these judges for their purely volitional participation in Facebook.

Underlying this discussion is the fact that case precedent on the appearance of impropriety comes from courts that relied on ethical codes that do not resemble the 2007 American Bar Association Model Code Model Code of Judicial Conduct. There is no question that the 2007 Model Code increased the stringency of the appearance of impropriety standard. In addition to being a canon of judicial ethics, the 2007 Code elevated the appearance of impropriety to a black-letter

¹⁹² MAFIA WARS BY ZYNGA, <http://www.facebook.com/MafiaWars> (last visited Apr. 4, 2011). Mafia Wars is an interactive Facebook game played amongst fellow Facebook users. There are currently 17 million monthly active users, and this is only one of a legion of similar Facebook games.

¹⁹³ See *supra* Part III(B)(2).

¹⁹⁴ See *O’Neill*, 709 So. 2d at 968 (discussing how the size of the judge’s town, Eunice, factored into the court’s decision to find no appearance of impropriety).

¹⁹⁵ See Ala. Judicial Inquiry Comm’n, *supra* note 155 (“A judge is not in violation of Canon 2 by attending the same church as the lawyer-friend. A judge cannot control the church the friend attends or the stores at which the friend shops, and should not be expected to change his church attendance and shopping in response to this issue.”).

rule.¹⁹⁶ However, many states have yet to adopt these changes.¹⁹⁷ As more states begin to adopt the 2007 Code,¹⁹⁸ they will not only have existing precedent to rely on with respect to the appearance of impropriety, but also a new code that quite clearly promulgates a tougher standard.

Some advisory opinions suggest Facebook friendships are *sui generis*; however, it is difficult to imagine courts continuing to preserve such a distinction as Facebook falls into place among other forms of conventional communication. The more integral Facebook becomes to the social landscape of the world, the less likely it is that states will be able to carve out an exception for Facebook friends under the appearance of impropriety precedent, particularly in light of a newer and more stringent Code of Conduct. It is not a matter of *if* courts will find Facebook friends capable of creating the appearance of impropriety, but a matter of *when*.¹⁹⁹

C. Normative Concerns

Even if one takes for granted that a Facebook friendship can give rise to the appearance of impropriety under the factors provided by precedent, a normative question remains: should it? The factors used in prior cases to assess the appearance of impropriety exist only as means to determine when it would be reasonable to infer actual impropriety.²⁰⁰ As previously mentioned, the specific impropriety inferred in most instances involving the relationship between a judge and a third party is that the judge favors or disfavors the third party.²⁰¹ If we know that Facebook friendships are, in actuality, incapable of evoking this kind of bias, then perhaps Facebook friendships should be permitted regardless of what an analysis under the precedential framework would suggest.²⁰²

¹⁹⁶ See *supra* Part III(A).

¹⁹⁷ The cases discussed predate the 2007 Model Code and were predicated on an arguably weaker standard. See *supra* Parts III(B)(1-2).

¹⁹⁸ Some states have already adopted the ABA language from the 2007 Code. See, e.g., OHIO CODE OF JUDICIAL CONDUCT Canon 1 (2009), available at <http://www.supremecourt.ohio.gov/LegalResources/Rules/conduct/judcond0309.pdf>; MARYLAND CODE OF JUDICIAL CONDUCT Canon 1 (2010), available at <http://www.courts.state.md.us/rules/reports/codeofjudicialconduct2010.pdf>.

¹⁹⁹ The impact will be considerable. See generally McKoski, *supra* note 65.

²⁰⁰ See *supra* Part III(B).

²⁰¹ See *supra* Part III(B).

²⁰² This argument concerns the “reasonable person” standard, which underlies the appearance of impropriety. See McKoski, *supra* note 65, at 1931. “Closeness,” “control,” and “disclosure” are factors that courts use to determine when it is “reasonable” to infer impropriety. See *supra* Part III(B), Sections 1 - 3. The point is that if for

While precedent suggests that Facebook friends may be “close” insofar as they satisfy criteria for closeness used by courts, there certainly is an argument that people subjectively think of Facebook friends as something less than real-world acquaintances. Therefore, it makes little sense to assume bias flows from Facebook friends in the same way as it does from other “close” relationships. Such an argument is in line with traditional notions of favoritism: we exhibit positive bias towards those who we subjectively consider “close friends.”²⁰³ However, evidence in the field of psychology suggests that bias is not so simple, and in many instances, bias appears to have little to do with subjective beliefs about how close a friend is.²⁰⁴

Instead, bias often arises in the form of “unconscious bias.”²⁰⁵ Factors that go far beyond those we use to determine the “closeness” of a friendship are capable of bringing on this kind of bias.²⁰⁶ Psychologists have long studied the phenomenon of “in-group” bias, which occurs when individuals consciously or unconsciously categorize others into groups, and then exhibit bias towards or against others based on group membership.²⁰⁷ Studies have shown that individuals are capable of constructing these groups based on the most insignificant common factors, and will continue to exhibit positive bias towards those they consider group members.²⁰⁸ In one study, the researchers divided individuals into groups based on a simple preference survey, and the subjects ultimately exhibited bias towards group

some other reason we *know* it is not reasonable to infer impropriety from a Facebook friendship, then it should be permitted even if closeness, control, or disclosure frameworks suggest otherwise.

²⁰³ See generally Marilynn B. Brewer, *In-Group Bias in the Minimal Inter-group Situation: A Cognitive-Motivational Analysis*, 86 PSYCHOL. BULL. 307 (1979).

²⁰⁴ See generally *id.*

²⁰⁵ See, e.g., Deana A. Pollard, *Unconscious Bias and Self-critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 917-24 (1999) (“Part of the nature of ‘in-group/out-group’ dynamics is the tendency to see members of one’s own group as individuals, but out-group members as an undifferentiated, stereotyped mass.”). In her article, Pollard focuses on unconscious bias occurring in traditional racial and gender stereotypes, while applying her general background knowledge of the phenomenon of unconscious bias.

²⁰⁶ See, e.g., *id.* at 917 (“When traditional groups such as villages and tribes broke down, people were inclined to classify themselves along race and class lines.”).

²⁰⁷ See generally Marilynn B. Brewer, *In-Group Bias in the Minimal Inter-group Situation: A Cognitive-Motivational Analysis*, 86 PSYCHOL. BULL. 307 (1979).

²⁰⁸ See, e.g., *id.* at 307-08 (describing a study where experimenters divided eleven-year old boys arbitrarily into two groups. After the two groups were isolated from one another for eight days, the “campers revealed consistent bias favoring members of their own group over members of the competing group.”).

members even though there was no face-to-face interaction, no joint task, and complete anonymity among members.²⁰⁹ That is, subjects exhibited bias towards people they had never even seen or interacted with, simply because those people indicated similar preferences on a survey.²¹⁰

This kind of data becomes worrisome when one considers that one of the primary features of Facebook is the ability to track friends' interests, affiliations, "likes," and general progression through life.²¹¹ The Facebook user typically knows massive amounts of information about each of his Facebook friends—far more than what he knows about the average "real-life" acquaintance. With the availability of all this information, users run the risk of unconsciously categorizing Facebook friends into groups, and, in turn, exhibiting unconscious biases based on these groupings.

For example, a judge who maintains a Facebook friendship with an acquaintance might see that the individual, like the judge himself, is divorced, loves the Cleveland Browns, and has read everything ever written by James Joyce. The in-group bias research suggests that this may be enough for the judge to impart a positive bias towards his Facebook acquaintance. Even though the judge maintains little, if any, communication with the Facebook friend, there is a possibility that he will exhibit more preference to that individual than another acquaintance that he sees quite regularly but knows little about. That is, Facebook friendships may convey more bias in Facebook users than casual, real-world acquaintances do.

One response, however, is that introducing this body of knowledge into judicial ethics is a slippery slope. With unconscious bias in mind, it would arguably be "reasonable" to find factors capable of creating bias—and, consequently, the appearance of impropriety—in a vast array of scenarios that go far beyond Facebook. If unconscious bias is fair play, there is no limit to what individuals could argue creates the appearance of impropriety.²¹² Even so, this slippery slope argument should be disregarded for several reasons.

Much of the expansion possible under this theory has already been foreclosed by past courts' emphasis on control. If a judge is not accountable for any appearance of impropriety created by an acquaintance's choice of where to attend a church service, it is unlikely a court would discipline a judge for some small exhibition of uncon-

²⁰⁹ See *id.* at 309 for a more comprehensive explanation of the Tajfel study.

²¹⁰ *Id.*

²¹¹ See *supra* Part I for an overview of Facebook's various features.

²¹² See Pollard, *supra* note 205, for a discussion about unconscious bias in the racial context.

scious bias stemming from factors he has no control over. The rationale for including unconscious bias when evaluating Facebook usage under the appearance of impropriety standard is precisely because users have so much control. The bias may be unconscious, but it arises from the judge's voluntary choice to participate in Facebook's social network.

Moreover, the nature of Facebook is such that it invites not just some trace amount of unconscious bias, but could potentially unleash a torrent of hidden prejudices. Many of us know almost everything about our Facebook friends, even those who we have little if any day-to-day interaction with. The hobbies, marital status, hometown, and innumerable tastes and preferences of each Facebook friend are available on demand by simply clicking. We also learn a lot about a friend's traits involuntarily via constant updates in the Facebook "feed." Such an overload of information creates a unique risk for the onset of unconscious bias.

In summation, psychological data on the phenomenon of unconscious bias suggests that Facebook friends are, in fact, something we should be concerned about in assessing a judge's Facebook use and the appearance of impropriety standard. Given that Facebook is a controllable yet expendable part of one's social life, it seems perfectly reasonable to restrict judicial use of the site in order to prevent unconscious bias. Encouraging judges to abstain from creating a Facebook profile, or at least from "friending" those likely to appear before them in court, is hardly "unreasonably burdensome" or forcing them to "live in a vacuum."²¹³ After all, "[a] judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens"²¹⁴

V.CONCLUSION: CHANGING THE CODE

If, as the prior sections argue, states will—as they should—ultimately find that Facebook friendships create the appearance of impropriety, is there a need for the ABA or the states to change their codes of judicial ethics? The answer is yes. As the advisory opinions demonstrate, it is unlikely that states will move towards properly applying the appearance of impropriety standard to Facebook friendships at a uniform pace, and some may never do so at all. This will create an aura of uncertainty and confusion that could be strikingly similar to the treatment of the appearance of impropriety standard

²¹³ See *O'Neill*, 709 So. 2d at 968.

²¹⁴ See MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 2 (2007).

before the ABA's 2007 Model Code. The ABA should take the initiative and resolve the impending confusion, as it has done with the appearance of impropriety standard.

But what specifically, can the ABA do? As previously recognized, advisory opinions do not have sufficient weight to settle the matter.²¹⁵ Further, establishing a "No Facebook" rule in the Model Code would be incongruous with the other broader Code rules, and could raise constitutional concerns.²¹⁶ Perhaps the ABA's best action would be to modify the Model Code to include a comment on the subject. Under Rule 1.2, the ABA should add a seventh comment, specifying that:

Friendships on social networking websites are capable of creating the appearance of impropriety. The best way to avoid creating such an appearance of impropriety is to abstain from maintaining a presence on social networking sites after taking judicial office.

Such a simple and succinct comment would directly foreclose the dozens of potential ethics cases that could arise concerning judges and Facebook "friends." Some in the legal community may grimace at what would effectively be a "Facebook ban" for judges, but judges are expected to make certain sacrifices that would be "burdensome if applied to other citizens."²¹⁷ Abstaining from participation in social networking is a small price to pay for the preservation of judicial integrity.

Conversely, continuing to allow Facebook use places judicial ethics jurisprudence on a convoluted path that may last for decades. Even if the ABA refrained from discouraging Facebook use, several states have already voiced concerns about judges and social networking. History suggests it is only a matter of time before judges begin facing disciplinary action for their Facebook usage. Courts may need years to develop the appropriate appearance of impropriety standard in the social-networking context. Furthermore, without clarity and direction, the courts will continue to struggle to create a doctrine that is workable for the countless scenarios that may arise.

²¹⁵ See *supra* note 167.

²¹⁶ Certainly, a more direct way to avoid the appearance of impropriety would be to ban judicial Facebook use outright with a black-letter-rule. However, doing so could raise First Amendment concerns. As proposed, the comment language avoids this issue while still clarifying that: (1) Facebook friendships can create the appearance of impropriety; and, (2) judges should consider avoiding social networking altogether.

²¹⁷ MODEL CODE OF JUDICIAL CONDUCT, *supra* note 214, at 12.

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The only reasons courts have suffered through such a process with real-world relationships is because, as a practical and constitutional matter, states cannot ban judges from socializing. We do not have to go down the same road with Facebook use. If the ABA makes it clear that being a member of social networking sites can create ethical problems under the appearance of impropriety standard, the vast majority of judges would close their Facebook accounts upon taking judicial office. As a result, we would have a judiciary that is both actually and apparently less biased. We do not need another century of uncertainty surrounding the appearance of impropriety. The ABA should take this opportunity to resolve this issue immediately.